October 15, 2019 - MDV Teleconference with EPA and ODEQ – Draft Notes

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Agenda: ODEQ wanted to discuss the legal vulnerabilities and defensibility associated with the proposed MDV rule, and EPA's concerns. EPA laid out three major concerns: HAC, 20-year term, PMPs. EPA and ODEQ also discussed issues related to timing of the variance, how the variance would work in conjunction with a TMDL, and re-evaluation requirements.

1. HAC Justification
    a. Discussed "no additional feasible pollutant control technology" and the possibility of setting an effluent concentration for facilities to meet without advanced treatment (under HAC2). The bubble permit concept, which was discussed during a prior call does not appear to be a viable option.

        i. ODEQ argued there is a defensible logic under factor 3 that there isn't additional feasible pollutant control because of increased environmental harm (more so than leaving pollutant in place) and either way the WQS cannot be reached due to technology constraints.
        ii. EPA's concern of legal vulnerability: It wouldn't go unnoticed that justification for variance is based on "cannot be remedied," but the HAC3 justification is reached using "feasibility/environmental harm." Only one side of the environmental harm argument was looked at in the variance (did not look at the benefits of upgrading).
        iii. Conundrum: Some confidence that PMPs can get to the same (similar) level as advanced treatment over time but not enough confidence to establish that level as interim effluent condition under HAC2.
            1. ODEQ believes administratively it would be more efficient and workable to use level currently achievable (HAC3). Permittees under the variance would be assigned quarterly permit limit based on previous 5 years of data. At permit renewal timing, the state would review the prior 5 years of data and adjust limit to be more stringent, as needed.
            2. Oregon may discuss more with their permit team. Compliance schedule could be tricky because OR is under impression that they would need to know treatment to be applied and whether the facility can get into compliance. But in this case, compliance schedule + variance (set of milestones to get you to HAC target from variance) could be enough. The use of compliance schedules in conjunction with permits/variances was well thought out during the 2015 variance regulation creation.

    b. Discussed how HAC3 argument might work. Might be able to argue "cannot be remedied" then look at what can be remedied. Maybe what is feasible for mercury is implementation of PMPs (not point source treatment upgrades). Tie to agency guidance of implementation of methylmercury criteria.

2. Justification for 20 Year Term
    a. ODEQ: At the end of 20 years, facilities still would not be able to meet criterion without advancements in technology.

i. Because PMPs are the main solution, permittees will have to keep finding additional reductions they can make in their service area.
ii. Additional site specific PMPs will be created at permit renewal.
iii. EPA recommendation: If the state is applying a 20 year term for all the dischargers, then the support documents should provide a clear and detailed rationale. For example, acknowledge that the state is choosing a shorter timeframe for the dischargers given the persistent nature of mercury (because still would not achieve compliance in 20+ years). Should also discuss why 20 years may allow for real change/action, and, even though dischargers would not reach the ultimate reduction goal when the term is reached, it would be a good time to reconsider the assumptions made in the variance.

3. Statewide PMP Commitments
    a. Need to include in the variance as part of the HAC3 justification, the specific PMPs OR is committing to. This can include non-point source reductions; commitments under existing programs, such as the Forest Practices Act and Ag Water Practices Act (even if they are commitments the state is already implementing); and possibly air quality permitting or controls.

4. Timing
    a. If the draft TMDL for mercury is finalized and not challenged, then a variance would not be necessary. The TMDL must be approved by the end of November to meet litigation imposed timelines.
    b. There is a possibility that the TMDL will be challenged, including a stay in implementation. If this is the case, the variance would be needed.
    c. If the TMDL is not challenged, how do we argue that there's a need for the variance?
    d. Need to think through this issue further. Suggest adding clear language that if a permittee's effluent limit is consistent with the TMDL then that permittee is not authorized under the variance.

5. The timing of the HAC variance review likely won't line up with permit review - aggregate state-wide review
    a. Aggregate piece for TMDL works.
    b. 5-year reevaluation for individual dischargers (looking at whether LCA is lower/more stringent and whether additional PMPs should be considered) is required by the variance. Should also review the commitments made by the state at the reevaluation.

6. Follow-up on Monday 10/21. Comment period closes 11/4 at 4pm PST
    a. Agenda for 10/21 call:
        - Review meeting notes and discuss any discrepancies.
        - Discuss comments EPA may make during the public comment period.
        - Discuss whether all potential dischargers must be listed in the variance or whether how it's written now allows for dischargers to be added during the term of the variance.
    b. Before 11/4, EPA would like to discuss the oral comments received during the 10/22 hearing or submitted in writing.
    c. ODEQ committed to share comments received on the variance during the public notice period.